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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDWIN SANABRIA SANTIAGO, Defendant and Appellant.	H045326 (Monterey County Super. Ct. No. 17CR002198)

A jury convicted defendant Edwin Sanabria Santiago of inflicting corporal injury on a cohabitant, assault with force likely to produce great bodily injury, and false imprisonment by violence. For these crimes, the trial court sentenced Santiago to four years in prison.

On appeal, Santiago claims that the trial court erred by failing to instruct the jury on self-defense and by admitting evidence of a 911 call and Santiago's prior domestic violence conviction. In addition, Santiago contends that his defense counsel was prejudicially ineffective for failing to object to improper arguments made by the prosecutor. Santiago claims that the cumulative effect of these errors requires a reversal of his conviction. As to his sentence, Santiago argues the trial court abused and failed to exercise its discretion in sentencing him to the upper term of four years.

For the reasons explained below, we affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

A. Procedural Background

In September 2017, the Monterey County District Attorney filed an information charging Santiago with inflicting corporal injury upon a cohabitant, Jane Doe (Pen. Code, § 273.5, subd. (a);[1] count 1), assaulting Jane Doe by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2), and false imprisonment of Jane Doe by violence (§ 236; count 3).[2]

In October 2017, a jury heard evidence and found Santiago guilty as charged. The trial court sentenced Santiago to the upper term of four years in prison on count 1 and count 2, and to the upper term of three years in prison on count 3. The trial court stayed the sentences on count 2 and count 3 under section 654. The trial court also imposed various fines and fees.

B. Trial Evidence

Santiago and Jane Doe dated for about three and one-half years before the incident that resulted in this prosecution. During the two and one-half years that they lived together, Santiago sometimes kicked Jane Doe out of his apartment because of his jealousy. He also accused her of infidelity.

On the day of the incident, Jane Doe had not been staying at Santiago's apartment for about a week, and their relationship was tense. Jane Doe went to the auto body shop where Santiago worked to retrieve a backpack and personal belongings she had left at Santiago's apartment. Jane Doe entered the storage area of the shop and saw Santiago working on his truck. She asked him about retrieving her backpack. They spoke for about 20 minutes but then started arguing after Santiago questioned Jane Doe about why

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[1] Further unspecified statutory references are to the Penal Code.

[2] The information mislabeled count 3 as "[c]ount 4." There were only three counts charged. The prosecutor orally corrected this error prior to trial.

she had not been staying with him at the apartment and where she had gotten the items in her backpack. Santiago yelled at her to "get the fuck out of here." Jane Doe turned and walked out; Santiago followed her.

Outside the shop, Santiago picked up a water hose and sprayed Jane Doe, soaking her. She turned around, walked a couple of steps toward Santiago, and said, "what the fuck is wrong with you." She was afraid of him and angry. Santiago grabbed Jane Doe by her sweater, pulled her back inside the shop, and locked the door. Santiago punched Jane Doe on the right side of her forehead. She screamed for help and tried to get away. Jane Doe saw a metal bar by the door and briefly grabbed it to defend herself, but Santiago took the bar from her and hit her in the back with it. Santiago pulled Jane Doe further into the shop, and she fell to the concrete floor. Jane Doe continued screaming while trying to defend herself and get away. She felt she was fighting for her life. Santiago punched her right ear and told her to shut up.

Santiago pulled the hood of Jane Doe's sweater over her face. She tried to get Santiago off of her, and she likely scratched his forehead when fighting back. Santiago grabbed Jane Doe by her jeans and pulled her about five feet across the floor. Tired of fighting and screaming, Jane Doe gave up and told Santiago to just kill her, if that is what he was going to do. Santiago got off of Jane Doe, sat next to her on the floor, kissed her on the side of her face, and said he was sorry and that they should go home. Jane Doe told Santiago that she was not going home with him. Jane Doe heard dogs outside, and Santiago begged her to be quiet. Hoping that it might give her a chance to get away, Jane Doe told Santiago to get on his knees and beg her. When he did, she went to the door and opened it. Police officers were outside.

Francisco Castillo Cabrera worked at a nearby restaurant and called 911 during the incident.[3] Cabrera had seen Jane Doe and Santiago, first sitting outside and then entering

[3] An audio recording of Cabrera's 911 call was played for the jury.

the shop. Later Cabrera heard a lot screaming inside the shop. From a distance of approximately 42 feet, Cabrera saw Jane Doe come out of the shop and fall. Cabrera saw Santiago cover Jane Doe's mouth, grab her, and pull her back inside. Cabrera called 911 and asked the operator to send a police officer "urgently" because he believed a woman was being beaten up inside the shop. Cabrera told the operator that he had seen the woman open the shop door and get dragged back inside. Cabrera said he was reluctant to describe the assailant to the operator for fear of getting into trouble.

The police arrived while Cabrera was still on the phone with the 911 operator. Cabrera directed the police officers to the shop, from which the officers could hear people arguing and a woman screaming. The officers were about to enter the shop when Jane Doe opened the door and stepped outside. She was crying and distraught, her clothing was disheveled, her mouth was bleeding, and she had several bruises on her face. Santiago was standing inside the shop. He had a bloody, swollen lower lip and a scratch on his forehead, which was bleeding slightly. Santiago did not have any injuries to his hands.

Jane Doe had a bruised nose, a bump on her forehead, bleeding from her mouth, a cut lip, a bruise on her back, ringing in her right ear, and pain in her abdomen where Santiago had sat on her. Jane Doe told the police officers that she had been hit in the face several times and hit in the back with a pipe. She declined transport to the hospital because she did not think she could afford the medical bill. She went to the hospital on her own later that night. She asked the police officers for the keys to Santiago's apartment, so she could retrieve her belongings. Jane Doe started living in Santiago's apartment again after the incident.

The incident at the shop was not the first time Santiago assaulted Jane Doe. Jane Doe told the jury about three other incidents, which she had not reported to the police. In early 2014, Santiago slapped Jane Doe. She had been playing a game on her phone, and Santiago tried to take her phone because he thought she was texting someone. Santiago

slapped Jane Doe again on July 4, 2014, while they were at a friend's barn shooting off fireworks. Around the spring of 2015, Santiago and Jane Doe were in a car when her phone rang. Santiago grabbed her phone and "backhanded" her—causing her to bleed—when she tried to get out of the car. Santiago drove recklessly with his arm linked around Jane Doe's while her car door was open. He would not let her get out of the car. She did not report these incidents to the police because she loved Santiago.

At the conclusion of the prosecution's case, the trial court read a stipulation to the jury regarding two of Santiago's prior convictions. The jury heard that, on December 3, 1996, Santiago was convicted in Monterey County of misdemeanor domestic violence against J.Z., and on October 17, 2011, he was convicted in Monterey County of misdemeanor domestic violence against B.L. The stipulations did not include any information about the facts underlying these convictions.

The defense rested without presenting any witnesses.

II. DISCUSSION

Santiago raises six claims on appeal. Santiago argues that the trial court erred by failing to sua sponte instruct the jury on self-defense. He also faults the trial court for admitting Cabrera's 911 call and allowing into evidence Santiago's 1996 misdemeanor domestic violence conviction. In addition, Santiago contends that his defense counsel was prejudicially ineffective for failing to object to improper closing arguments by the prosecutor. He claims that the cumulative effect of these alleged errors requires a reversal of his conviction. As to his sentence, Santiago asserts the trial court abused and failed to exercise its discretion in sentencing him to the upper term of four years for his conviction on count 1.

A. *Self-Defense Instruction*

Santiago claims that there was substantial evidence supporting self-defense, and the trial court had a sua sponte duty to instruct the jury on his right to act in self-defense using CALCRIM No. 3470.

1. Legal Principles

"To justify an act of self-defense . . . the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. The threat of bodily injury must be imminent, and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065, citations omitted.) Reasonableness is determined from the point of view of a reasonable person in the defendant's position; the jury must consider all the facts and circumstances it might expect to operate on the defendant's mind. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1083; CALCRIM No. 3470.)

A trial court has a sua sponte duty to instruct regarding a defense that is not inconsistent with the defendant's theory of the case if there is substantial evidence to support the defense. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*Ibid*.) Doubts whether evidence is sufficient to warrant an instruction on a particular defense theory should be resolved in the defendant's favor. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145 (*Barnett*).) We independently review whether the trial court erred by failing to instruct on a defense. (See *People v. Simon* (2016) 1 Cal.5th 98, 133; *People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

2. Analysis

At trial, Santiago's defense theory did not include self-defense, and he did not request a self-defense instruction.[4] Santiago's principal defense was that Jane Doe had fabricated the incident because she wanted to move back into his apartment and because

[4] Before trial, defense counsel acknowledged that a self-defense theory would "open[ ] the door as to Mr. Santiago's violent past."

she was angry at Santiago. In his closing argument, defense counsel argued that the prosecution had not proven its case beyond a reasonable doubt. Defense counsel also urged the jury to reject Cabrera's testimony because his view of the incident was impeded, and his recollections were inconsistent with other evidence.

The trial court stated it would not instruct the jury on self-defense because that defense was not part of Santiago's theory of the case, was inconsistent with Santiago's chosen theory, and was not supported by substantial evidence.

On appeal, Santiago claims the trial court erred because "there was ample evidence from which the jury could have concluded [he] acted in self-defense." Santiago asserts that, after he sprayed Jane Doe with water as she left the shop, she was "afraid, angry and mad" and "turned and confronted" him. Santiago claims that the jury could have found that Jane Doe "was ready to attack" him and could have "dismissed as fabrication to avoid prosecution" her statement that he grabbed her. Santiago also argues that substantial evidence—including Jane Doe's testimony about her aggression toward him during the altercation, the scratch he had on his face, and his swollen lip—supports his claim of self-defense.

We are not persuaded. We conclude that the evidence at trial does not present substantial evidence of the required elements of self-defense—namely that Santiago reasonably believed (1) that he was in imminent danger of suffering bodily injury or being touched unlawfully, (2) that the immediate use of force was necessary to defend against that danger, and (3) that Santiago used no more force than was reasonably necessary to defend against that danger. (CALCRIM No. 3470.)

The trial evidence established that, after being sprayed, Jane Doe turned around, walked a couple of steps toward Santiago, and angrily cursed at him. Santiago responded by grabbing Jane Doe, dragging her back inside the shop and locking the door. Santiago's initial aggression toward Jane Doe was corroborated by Cabrera, who said he saw Santiago grab Jane Doe and pull her back inside the shop. Based on this consistent

testimony, a reasonable jury would not have found that Santiago reasonably believed that Jane Doe was about to attack him and that she fabricated her statement that he grabbed and pulled her into the shop, overcoming her attempt to get away from him. In light of the evidence, any conclusion that Santiago believed he was in imminent danger and needed to use force to defend against that danger would be unfounded and highly speculative.

In addition, although Jane Doe attempted to resist Santiago, briefly grabbed a metal bar, and fought back against Santiago's assault, the nature and extent of Santiago's actions contradict any finding that he used no more force than was reasonably necessary to defend against an imminent danger. Santiago punched Jane Doe twice, hit her with the metal bar in the back, pulled her further into the shop, prevented her from getting away, pulled her hood over her face, and told her to shut up as she screamed for help. The jury also heard evidence about three prior assaults Santiago perpetrated on Jane Doe.

A court need not instruct on a defense "where the supporting evidence is minimal and insubstantial." (*Barnett*, *supra*, 17 Cal.4th at p. 1145.) Based on the record here, the trial court did not err in failing to sua sponte instruct on self-defense.[5]

B. *911 Call*

Santiago claims that the trial court erred when it admitted Cabrera's 911 call pursuant to the hearsay exception for spontaneous statements. (See Evid. Code, § 1240.) Santiago asserts that there was no support for the trial court's conclusion that Cabrera was under the stress of excitement when he made the call.

[5] Because we conclude that the evidence did not support an instruction on self-defense, we do not address whether self-defense was inconsistent with Santiago's actual defense.

1. Background

Prior to trial, the prosecutor filed an in limine motion to admit the 911 call as a spontaneous statement. At a pretrial hearing on the motion, the trial court listened to a recording of the 911 call. The call included dialogue in English and Spanish, and the recording was accompanied by a transcript with translation from Spanish to English.[6] The prosecutor argued that the content of the call revealed that Cabrera had reported the events as he perceived them and that he believed someone was being injured. The prosecutor stated that in the recording Cabrera sounded like he was under the stress of excitement from an ongoing emergency. Defense counsel argued that the 911 call was not an excited utterance because Cabrera spoke calmly, slowly, and deliberately, and most of his statements were responses to questions by the 911 operator, not contemporaneous descriptions of events he was witnessing.

The trial court found the call admissible under Evidence Code section 1240. Specifically, the court made the factual finding "that [Cabrera] was still under the stress of excitement caused by his perceptions" based on his "voice inflection" and "the manner [in which] he delivers some of his responses." The court noted that the fact that many of Cabrera's statements were made in response to questions did not "make this into a non-spontaneous statement." The court observed that the simultaneous translation during the 911 call "actually is what really kind of makes it go question-by-question . . . rather than having someone be able to blurt something out."

The 911 call was played for the jury during Cabrera's testimony, and the English-language transcription of the call was admitted into evidence. Cabrera testified to the jury that he told the truth about what he had observed when he spoke to the 911 operator.

[6] Santiago does not challenge the translation as inaccurate; he relies on the English-language translation of the call to argue the trial court erred in finding the content of the call admissible as a spontaneous statement.

Cabrera also recounted to the jury what he observed and heard with respect to the interactions between Santiago and Jane Doe, which was consistent with what he had told the 911 operator.

2. Analysis

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Evidence Code "[s]ection 1240 is the codification of an established common law exception to the hearsay rule." (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*).) " 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' " (*Ibid*.)

"A number of factors may inform the court's inquiry as to whether the statement in question was made while the declarant was still under the stress and excitement of the startling event and before there was 'time to contrive and misrepresent.' [Citation.] Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant's emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. [Citations.] [N]o one factor or combination of factors is dispositive." (*People v. Merriman* (2014) 60 Cal.4th 1, 64 (*Merriman*).)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*Merriman, supra*, 60 Cal.4th at p. 65.) "A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) As to the second factor—that is, whether the statement was made spontaneously—"the discretion of the trial court is at its broadest when it determines whether this requirement is met." (*Poggi, supra*, 45 Cal.3d at p. 319.)

Santiago contends that neither the transcript nor the recording supports the trial court's conclusion that Cabrera's 911 call was made while he was under the stress of excitement caused by his observations. In addition, Santiago asserts that, even if Cabrera was under the stress of excitement during the call, the trial court ignored other possible causes of Cabrera's stress, including that Cabrera may have feared deportation or felt stressed by difficulty in communicating with the 911 operator.[7]

Based on our review of the recording and accompanying transcription, the trial court did not abuse its discretion in finding that Cabrera's statements were spontaneous within the meaning of Evidence Code section 1240. Cabrera placed the call to 911 while Jane Doe was inside the shop screaming for help as Santiago assaulted her. When initially asked to state his emergency, Cabrera told the 911 operator to "send [him] a

[7] Santiago does not cite anything in the record specifically supporting his assertion that Cabrera may have been an "illegal alien" worried about "subjecting himself to deportation." In addition, a Spanish interpreter joined the call about 30 seconds after Cabrera initiated it.

police officer urgently" because he believed a woman was being beaten up inside the shop. Soon thereafter, in response to questions regarding the location of the incident, Cabrera again said that the need for police was "urgent." He reported being in a parking lot outside the shop, expressed concern about talking to the operator, and reiterated the urgent need for a police officer to respond. Cabrera said that he could hear a woman screaming a lot, and that she had been dragged back inside when she opened the door. On the audio recording, Cabrera's speech is quick and pressured—in accord with the trial court's characterization of Cabrera's voice and the dialogue.

For these reasons, we conclude that the trial court did not abuse its discretion in admitting Cabrera's 911 call under Evidence Code section 1240.

C. *Prior Domestic Violence Conviction*

Santiago claims that the trial court abused its discretion when it admitted, pursuant to Evidence Code section 1109, evidence of his 1996 misdemeanor conviction for a violation of section 273.5. Specifically, Santiago contends that the trial court misapplied the "interest of justice" test for admission of convictions more than 10 years old, as required by Evidence Code section 1109, subdivision (e).

Because Evidence Code section 1109 does not define the phrase "interest of justice," Santiago argues that the trial court should have applied the test for striking prior strike convictions "in the furtherance of justice" pursuant to section 1385, subdivision (a), developed by the Supreme Court in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Drawing from *Romero*, Santiago appears to argue that the trial court should have addressed individual considerations related to Santiago when considering whether admission of the 1996 conviction was in the "interest of justice." In addition, Santiago contends that, even if the trial court used the proper interest of justice standard, its application was incomplete and an abuse of discretion. The Attorney General counters that Santiago forfeited his claim of error because defense counsel failed to object to the scope or basis of the trial court's ruling that the 1996 conviction was admissible in the

interest of justice and, in any event, the trial court properly considered the interest of justice before admitting the prior conviction.

1. Background

The prosecutor filed an in limine motion seeking to admit certain prior acts of domestic violence under Evidence Code section 1109. Defense counsel responded with an in limine motion to exclude the proffered evidence. At a hearing on the motions, the trial court began the discussion by stating that it was "specifically conducting" an analysis under Evidence Code section 352 "as to each and every incident as to whether or not the Court should allow this, whether the incidents are more prejudicial than probative." The court also said that it was mindful of the requirement of Evidence Code section 1109, subdivision (e), and that it would "make a determination as to whether any incident [that occurred] outside the 10 years is admissible in the interest of justice."

After hearing argument, the trial court first ruled that evidence of three prior domestic violence incidents against Jane Doe were admissible. The court excluded evidence of a 2014 incident against B.L. (a victim different from Jane Doe), because charges arising from the incident had been dismissed. The trial court, however, agreed that Santiago's 2011 misdemeanor conviction under section 243, subdivision (e)(1), for domestic battery against B.L. was admissible. The parties agreed to present this conviction to the jury by stipulation, and Santiago does not challenge its admissibility on appeal.

Regarding the incident that resulted in Santiago's 1996 misdemeanor conviction under section 273.5, the prosecutor argued that the conviction was highly probative of Santiago's propensity to commit domestic violence because it involved yet another victim and was a conviction for one of the same charges that he faced for the incident involving Jane Doe. The prosecutor's in limine motion stated the facts of the 1996 incident as follows: "Defendant punched [J.Z.] and caused injuries to her eyes and face." The motion also said, "Defendant admitted [that] he struck [J.Z.] twice with his fist and

caused injuries." The defense motion in limine said J.Z. reported to police that "Santiago punched her multiple times on the face."

Defense counsel argued that, because the incident occurred more than 10 years earlier, it was presumptively inadmissible under Evidence Code section 1109 "unless the Court determines it's in the interest of justice." Defense counsel conceded that the "interest of justice is vague language" and noted "there does seem to be caselaw out there that suggests that especially if there is a pattern of domestic violence, we don't want to shroud somebody in a cloak of sort of purity without bringing up those past events." Defense counsel further argued that the proffered evidence had limited relevance and the interest of justice requirement was not satisfied here, because the 1996 conviction occurred 21 years before the incident in this case and 14 years before Santiago's next incident of domestic violence. Counsel also argued that if evidence of the 1996 conviction were admitted, it should be admitted through a stipulation "to avoid having unnecessary and prejudicial information brought out in front of the jury."

In ruling that the evidence of the 1996 conviction was admissible, the trial court said: "The Court is, once again, mindful of the requirements in terms of its analysis; not only the [Evidence Code section] 352 analysis, but also the additional analysis pursuant to [Evidence Code section] 1109(e) as to whether the Court determines that the admission is in the interest of justice. [¶] The Court does feel that this evidence is highly probative, and certainly should be [*sic*] in the interest of justice be presented to the jury. It involves a separate person [altogether]; and so there's actually three different people, it's not just one. [¶] So it's very highly probative evidence. The Court is, once again, mindful of [Evidence Code section] 452.5(b) that allows the proof of the commission of the criminal offense be proved by way of the record. [¶] There's really a lot of benefit, really, to the Defense in the court not allowing the presentation of the actual evidence itself by nature of the reporting party in each of those respective cases. [¶] That actually could be potentially -- that could involve more a [*sic*] emotional response from the jury than if the

Court allowed the presentation of the conviction itself to prove the conduct. [¶] The Court is mindful of that in allowing the presentation of the evidence in this way, and the Court is also mindful of the different incidents that are not being presented, the 2014 incident, two of the incidents in 2011, and also an additional incident in 1996. [¶] The Court does feel that in the interest of justice the evidence of the 1996 conviction is appropriate to prove conduct, and the Court would go ahead and rely on the parties' stipulation to try to remove any information that potentially would be unduly prejudicial. [¶] The Court's mindful of the fact that any conviction or presentation of evidence is prejudicial. It's whether the evidence is unduly prejudicial versus the probative value that the Court has to evaluate; and here, the evidence is highly probative and not unduly prejudicial."

2. Analysis

Evidence Code section 1109, subdivision (a)(1) states: "Except as provided in subdivision (e) . . . , in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code section] 1101 if the evidence is not inadmissible pursuant to [Evidence Code section] 352." Evidence Code section 1109, subdivision (e) addresses remote prior acts of domestic violence: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

" 'Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109).' '[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the

policy considerations favoring the admission of such evidence.' [Evidence Code section] 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes.' " (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232 (*Brown*), citations omitted.)

"Thus, while evidence of past domestic violence is presumptively admissible under subdivision (a)(1), subdivision (e) establishes the opposite presumption with respect to acts more than ten years past." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 537 (*Johnson*), fn. omitted.) Nevertheless, subdivision (e) "sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It clearly anticipates that some remote prior incidents will be deemed admissible." (*Johnson*, at p. 539.) The "interest of justice" exception under subdivision (e) may be "met where the trial court engages in a balancing of factors for and against admission under [Evidence Code] section 352 and concludes . . . that the evidence was 'more probative than prejudicial.' " (*Johnson*, at pp. 539–540.) "The section 352 balancing approach gives consideration to both the state's interest in a fair prosecution and the individual's constitutional rights. [T]his same type of analysis is appropriate for the 'interest of justice' exception under subdivision (e). [¶] To the extent a higher degree of scrutiny is called for, it is the conclusion drawn from the balancing test, not the process itself, that must change under subdivision (e)." (*Id*. at p. 539.)

We review the trial court's decision to admit a remote prior conviction "in the interest of justice" for an abuse of discretion. (*Johnson*, *supra*, 185 Cal.App.4th at p. 539.) "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*Brown*, *supra*, 192 Cal.App.4th at p. 1233, fn. omitted.)

As noted above, Santiago argues that the trial court failed to apply a proper standard of admissibility when interpreting the requirement that admission be "in the

interest of justice" under Evidence Code section 1109, subdivision (e). In particular, Santiago faults the trial court for not using the standard developed by the Supreme Court in *Romero* for assessing whether prior strike convictions should be stricken "in furtherance of justice" under section 1385, subdivision (a), when applying Evidence Code section 1109, subdivision (e). The Attorney General asserts that Santiago forfeited this argument by not specifically challenging the analysis conducted by the trial court.

We agree with the Attorney General that Santiago's claim regarding the standard and scope of the interest of justice requirement was not properly preserved for appellate review. An "objection [must] fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435; see Evid. Code, § 353.) Here, defense counsel did not argue that the "interest of justice" language in Evidence Code section 1109, subdivision (e), required an analysis of factors beyond those in *Johnson*, *supra*, 185 Cal.App.4th at pp. 539–540. The trial court was not given the opportunity to rule on the alternative standard that Santiago urges for the first time on appeal. Thus, Santiago's appellate argument was forfeited.

Even if we assume that this portion of Santiago's appellate claim was not forfeited, we reject his argument that the trial court should have interpreted the phrase "interest of justice" in Evidence Code section 1109 using an analysis grounded in *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 530–531. Santiago cites no case law analyzing Evidence Code section 1109 to support his position, and we see no need to

import the standard developed under section 1385 for striking prior strike convictions at sentencing into the wholly different statutory context of whether to admit prior domestic violence convictions for possible use by the finder of fact in determining whether criminal conduct has occurred.

In *Johnson*, the Court of Appeal concluded that both section 352 and the phrase "interest of justice" in Evidence Code section 1109 require a consideration of "the state's interest in a fair prosecution and the individual's constitutional rights." (*Johnson*, *supra*, 185 Cal.App.4th at p. 539.) "To the extent a higher degree of scrutiny is called for, it is the conclusion drawn from the balancing test, not the process itself, that must change under subdivision (e)." (*Ibid.*) We concur with the analysis of Evidence Code section 1109, subdivision (e) articulated by *Johnson*, and we conclude that the trial court appropriately applied the law and exercised its discretion when admitting the 1996 conviction.

The record demonstrates that the trial court was aware of and applied the standard under *Johnson* when ruling on the prosecutor's motion. The trial court explicitly acknowledged both the Evidence Code section 352 analysis and the interest of justice determination under Evidence Code section 1109, subdivision (e). The trial court found the proffered evidence to be "highly probative and not unduly prejudicial" and that it [¶] "certainly should be in the interest of justice presented to the jury," noting that the incident involved a third victim of Santiago's domestic violence. The court said it was "mindful of" other incidents proffered by the prosecutor that were not being presented to the jury and noted that a stipulation on the 1996 conviction would minimize any prejudice to Santiago. The trial court thus was cognizant of and careful to protect Santiago's constitutional rights. Given that Santiago's 1996 domestic violence conviction was part of a long standing pattern of physical abuse in his intimate relationships, was presented to the jury by stipulation and not inflammatory, and was highly probative of whether Santiago had a propensity to batter his partners (specifically

by punching them), the trial court did not err or abuse its discretion in admitting the conviction under Evidence Code section 1109, subdivision (e).

D. *Ineffective Assistance of Counsel*

Santiago claims that the prosecutor committed misconduct during her closing argument in two ways. First, Santiago argues that the prosecutor misstated the law in telling the jurors that they could not consider any lesser included offenses unless they first found Santiago was not guilty of the charged offenses. Second, Santiago argues that the prosecutor improperly urged the jury to convict him because he battered women in the past, regardless of the lack of evidence supporting the current charges. Because his defense counsel did not object to these alleged instances of misconduct, Santiago claims that counsel's failings amount to ineffective assistance of counsel.

1. Analysis

To prove that his defense counsel was constitutionally ineffective, Santiago must establish both that counsel's performance was deficient and that he suffered prejudice as a result of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) Santiago bears the burden of demonstrating by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) "It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) To satisfy the prejudice element of his claim, Santiago must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to [him], i.e., a probability sufficient to undermine confidence in the

outcome." (*In re Ross* (1995) 10 Cal.4th 184, 201.) We can reject Santiago's claim if he fails to establish either element of the *Strickland* standard. (See *Strickland*, *supra*, 466 U.S. at p. 687; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008.) We turn first to Santiago's claim that his counsel was ineffective for failing to object to the prosecutor's statements concerning the jury's consideration of lesser included offenses.

a. Prosecutor's Statements on the Jury's Consideration of Lesser Offenses

In her closing argument the prosecutor stated, "Now, I do want to discuss the lesser includeds. You will see the judge instruct you on some lesser included crimes that go along with these charges. And the key here is -- for you to remember is I'm not asking for you to return a verdict on these lesser includeds. [¶] Jury instruction 3517 says you don't even get to the lessers unless you all agree that the Defendant is not guilty on the primary counts, which is Count 1, Count 2 and Count 3 that I just went over. [¶] So *you don't even get to discuss the lessers or consider his guilty* [*sic*] *on the lessers unless you all agree that he's not guilty of Count 1, Count 2 and Count 3*. [¶] And when you all agree in Count 1 that he's guilty, you just stop right there; you don't need a verdict on the lesser includeds. [¶] And the judge will go over the instructions, and hopefully he can emphasize that for you just to make it a little clear." (Italics added.)

The prosecutor's statement was error. "[A] trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense." (*People v. Dennis* (1998) 17 Cal.4th 468, 536; see also *People v. Kurtzman* (1988) 46 Cal.3d 322, 335.) The Attorney General concedes that the "prosecutor misspoke when she told the jury that it did not 'get' to consider [Santiago]'s guilt[] on the lesser until they agreed he was not guilty of the greater offenses."

We need not decide whether defense counsel's failure to object to the prosecutor's statement amounts to deficient performance because Santiago cannot establish that he was prejudiced by defense counsel's inaction. Before the prosecutor presented her

argument, the trial court told the jurors, "If either attorney misstates the evidence or the law, you'll rely on the evidence as presented during the course of the trial and the law as stated by me." After closing arguments, the trial court instructed the jurors with CALCRIM No. 200, telling them: "You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The trial court also instructed the jury with CALCRIM No. 3517 about how to deliberate on the greater and lesser included offenses. Specifically, the court said, "It's up to you to decide the order in which you consider each crime and the relevant evidence. But I can accept a verdict of guilty of a lesser crime only if you have found the Defendant not guilty of the corresponding greater crime." Thus, the trial court informed the jurors that—contrary to the prosecutor's statement—they could consider and discuss the lesser crimes before or concurrently with the charged crimes. The jurors were thus instructed by the trial court that they had the prerogative to consider the evidence and charges in any order they wished.

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Because the trial court properly instructed the jury on its consideration of the lesser included offenses, we conclude that Santiago cannot show a reasonable probability of a more favorable outcome but for his counsel's failure to object to the prosecutor's single misstatement of the law. (See *People v. Stitely* (2005) 35 Cal.4th 514, 559; *People v. Osband* (1996) 13 Cal.4th 622, 717.)

b. Prosecutor's Statements about Santiago's Prior Convictions

Santiago's second claim of ineffective assistance is similarly unavailing. In her closing argument, the prosecutor stated in relevant part, "We're going to talk about uncharged domestic violence. This is jury instruction 852. This is one of those rare situations, ladies and gentlemen, where the law says if there is evidence that the Defendant has committed prior acts of domestic violence, you can use that evidence to

say that he committed the domestic violence in the current case. You can use that. [¶] He is predisposed to committing domestic violence. How do we know that? He abused two prior victims before. [J.Z.], [B.L.]. [Jane Doe] is his third victim. He assaulted not only one victim, but two victims, and he was convicted of both: Two completely unrelated females in the past from 1996 and 2011. He assaulted those females that he was in a relationship with. [¶] [Jane Doe] is victim number three, completely unrelated to [J.Z.] and [B.L.]. And the law says you may use that evidence to conclude that he assaulted [Jane Doe] in this case because he used those prior -- he abused those prior women. He's a convicted abuser. He likes to beat up women, this defendant right over here (indicating). He's done it once, he's done it twice, and he did it again with [Jane Doe], this third time. [¶] There is a pattern here, ladies and gentlemen. The lightning doesn't strike twice in the same place, and it certainly doesn't strike three times in the same place. He's done this before."

In her rebuttal argument, the prosecutor returned to this theme by stating: "He's a woman beater. He's a batterer. He is a serial batterer, ladies and gentlemen. This is again one of those rare situations where the law says you can use that and say that, because he attacked those women in the past, he attacked [Jane Doe] in this case."

Santiago asserts that these statements "exceeded the scope of the permissible use of propensity evidence" and contends that his defense counsel rendered ineffective assistance of counsel by not objecting to them.

We conclude that, when appropriately considered in the context of the prosecutor's entire argument (*People v. Cole* (2004) 33 Cal.4th 1158, 1203), the allegedly "deceptive and reprehensible" arguments were not objectionable. In addition to the arguments quoted above, the prosecutor also discussed the evidence against Santiago that related to the events of the day in question, including the evidence given by the percipient witness who called 911, the testimony of the officers who responded to the call, and the physical evidence of Jane Doe's injuries. Thus, the prosecutor did not suggest that the

jurors could ignore any deficiency in the evidence on the current crimes and find Santiago guilty solely because of his prior acts of domestic violence.

We do not find any error in the prosecutor's argument on this point, and Santiago's defense counsel could similarly and reasonably have concluded that the prosecutor did not mislead the jury about the permissible use of the propensity evidence. We therefore cannot say that there is no satisfactory explanation for defense counsel's failure to object to the prosecutor's statements here. (See *People v. Price* (1991) 1 Cal.4th 324, 387.)

Even if we assume for argument's sake that defense counsel's performance was deficient, Santiago cannot demonstrate prejudice resulting from counsel's failure to object. The trial court instructed the jurors with CALCRIM No. 852 regarding their proper consideration of the prior domestic violence evidence. (See *People v. Reyes* (2008) 160 Cal.App.4th 246, 250–253 [upholding CALCRIM No. 852].) In addition, defense counsel addressed the jury's consideration of Santiago's prior domestic violence in his closing argument. Defense counsel told the jury, "Just because he has those convictions doesn't end the discussion. You can let use [*sic*] them as the Court let's [*sic*] you use them. [¶] But ask yourselves if [the prosecutor] is trying to rely on things that are really old to try to get [Santiago] convicted, knowing there are some other issues in this case." Based on the totality of the record, we reject Santiago's assertion that, but for counsel's failure to object, it is reasonably probable that his trial would have ended more favorably. (See *Strickland, supra*, 466 U.S. at pp. 694–696.)

In sum, Santiago has not demonstrated any deprivation of his right to the effective assistance of counsel.

E. *Cumulative Error*

Santiago contends that the cumulative impact of prejudice from the numerous errors in his trial requires reversal. Because we find no errors, there is no prejudice to cumulate.

F. *Upper Term Sentence*

Finally, Santiago argues that the trial court both abused its discretion and failed to exercise its discretion when it sentenced him to the upper term of four years in prison on count 1 for inflicting corporal injury on a cohabitant.[8] First, Santiago claims that the trial court abused its discretion by relying on aggravating factors that were not supported by the evidence. Specifically, Santiago contends that his various convictions do not establish "that he has engaged in violent conduct that indicates he is a danger to society," and that his current crimes do not demonstrate viciousness. Second, Santiago claims that the trial court incorrectly relied on an outdated statutory scheme and thereby failed to properly exercise its discretion when sentencing Santiago to the upper term sentence.

The Attorney General counters that Santiago forfeited his claims of error because his defense counsel did not object specifically on the grounds raised on appeal, and the claims lack merit.

1. Background

Before sentencing Santiago, the trial court read and considered the probation report. The probation department stated that Santiago should be sentenced to prison rather than placed on probation but did not recommend a specific term. The prosecutor argued against probation and asked for a three-year prison term based on Santiago's history—which included two prior domestic violence convictions—his incapacity for rehabilitation, and continued recidivism. Jane Doe addressed the court and said that she thought Santiago needed a "program" and did not need to go to prison. Defense counsel argued for probation and noted that Santiago had only one prior felony conviction from Arizona for which he received a one-year prison sentence. In addition, defense counsel

[8] As discussed above, the trial court sentenced Santiago to the upper term of imprisonment on all three counts of conviction but stayed the sentences on count 2 and count 3 under section 654.

asked the court to select the lower term and stay two of the sentences under section 654 if it decided to impose a prison sentence. Defense counsel argued that two factors in aggravation listed in the probation report were elements of the crimes and thus could not be used as basis to impose a particular term. Finally, defense counsel noted two factors in mitigation—that Santiago's prior performance on probation was satisfactory and his prior criminal record was insignificant because he had only one felony conviction with a minimal sentence. Santiago apologized to the court and Jane Doe and asked for probation.

In describing its sentencing decision, the trial court stated that Santiago had a relatively long criminal history, including two convictions for domestic violence, as well as convictions for assault, contempt of court, battery, aggravated assault, disorderly conduct, criminal damage, and felony witness tampering. In deciding whether to grant probation, the trial court noted its consideration of the factors set forth in rule 4.414 (b)(1) of the California Rules of Court, including Santiago's "prior record of criminal conduct and the pattern of increasingly serious conduct and then a factor such as, if not in prison, danger to others." The court found that Santiago showed no remorse for his crime.

After denying probation, the trial court said it needed to make "a proper analysis in terms of factors in aggravation and factors in mitigation[,]" and stated its conclusion that [¶] "the factors in aggravation far outweigh the factors in mitigation, specifically [California Rules of Court, rule] 4.421(b)(1) that he's engaged in violent conduct that indicates a danger to society; [rule] 4.421(b)(2), the convictions are numerous and of increasing seriousness, and also [rule] 4.421(b)(3), the Defendant has served a prior prison term in the State of Arizona." The trial court then imposed the upper term sentences.

2. Analysis

In *People v. Scott* (1994) 9 Cal.4th 331, the Supreme Court held that "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*Id*. at p. 356.) The court explained, "Routine defects in the [trial] court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id*. at p. 353.)

Santiago argues that forfeiture does not apply to his first claim of error because defense counsel told the trial court that it was "hard for the Court . . . to really know what [Santiago's Arizona] convictions really mean and what the underlying conduct was in those [cases]." Santiago also notes that defense counsel argued for probation or the lower term sentence based on Santiago's "relative [*sic*] minimal conduct, certainly not a felonious type of record." In addition, Santiago contends that the forfeiture rule does not apply to his second claim (i.e., the trial court failed to exercise its discretion when selecting the sentence) because defense counsel mentioned that the trial court had "wide latitude and discretion on whether to grant probation or not." Moreover, Santiago asserts that his claim is exempted from forfeiture because it is grounded in the trial court's complete failure to exercise its discretion.

We disagree with Santiago and conclude that his claims of error were not properly preserved for appellate review. Defense counsel's general statements about uncertainty surrounding Santiago's Arizona convictions, the mitigating nature of Santiago's "minimal" conduct and record, and the trial court's discretion in deciding whether to grant probation did not adequately apprise the trial court of the alleged deficiencies in the support for its finding that Santiago was a danger to society. Similarly, defense counsel's statement about the trial court's "wide latitude and discretion" concerning probation did not inform the trial court of Santiago's current complaint that the court misunderstood current law and did not exercise its sentencing discretion at all. Thus, we conclude that Santiago's claims of error were forfeited.

Even if an objection were not necessary for Santiago to argue on appeal that the trial court failed to exercise its discretion, we reject the premise of Santiago's contention regarding the trial court's conduct in choosing the upper term. "A court is 'presumed to have been aware of and followed the applicable law' when imposing a sentence." (*People v. Reyes* (2016) 246 Cal.App.4th 62, 82.) The record here does not provide a reason to conclude that the trial court misapprehended the applicable law and thus failed to exercise its discretion to choose the appropriate sentence from the three available terms.

"In exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b).) "The court shall select the term which, in the court's discretion, best serves the interests of justice," and it "shall set forth on the record the reasons for imposing the term selected." (§ 1170, subd. (b).)

The trial court explicitly cited to the appropriate rules of court when selecting the sentence. The trial court properly set forth the reasons for its sentencing decision by stating them in terms of an imbalance between the aggravating and mitigating factors. We disagree with Santiago that the language used by the trial court suggests that the trial court thought the middle term was the presumptive term of imprisonment. That the trial court articulated its reasons in this manner—after saying it "needs to make . . . a proper analysis in terms of factors in aggravation and factors in mitigation"—does not demonstrate that the court did not know about or exercise its vested discretion.

Moreover, a trial court has broad discretion in making its sentencing choices. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A sentencing court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*) There is no evidence that the trial court relied upon an improper basis when electing to sentence Santiago to the

upper term. "One aggravating factor is sufficient to support the imposition of an upper term." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.) Here, the record establishes that the trial court's selection of the upper term for Santiago's crimes was not arbitrary or capricious. Santiago had a history of engaging in violent conduct (including against his intimate partners), had multiple prior convictions (including convictions for domestic violence), and had served a prior prison term. The trial court heard the evidence presented to the jury about the extent of Jane Doe's injuries, and Santiago's use of a metal bar to beat her. We conclude the trial court had ample justification for its decision to sentence Santiago to the upper term of four years.

III. DISPOSITION

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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MIHARA, ACTING, P.J.

_____
GROVER, J.

The People v. Santiago
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